ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES GUSTAVES JOHNSON, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2015-879**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Charles Gustaves Johnson, Jr., was tried by jury and convicted of Murder in the First Degree During the Commission of a Felony – Kidnapping (Count 1) (21 O.S.Supp.2012, § 701.7(B)) and Possession of a Stolen Vehicle (Count 3) (47 O.S.2011, § 4-103) After Former Conviction of Two or More Felonies in District Court of Tulsa County Case Number CF-2014-45.[1] The jury recommended as punishment imprisonment for life without the possibility of parole and a fine in the amount of $10,000.00 in Count 1 and imprisonment for life in Count 3.[2] The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively.[3] It is from these judgments and sentences that Appellant appeals.

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[1] The jury acquitted Appellant of the alternative charge of Murder in the First Degree (Malice Aforethought) (21 O.S.Supp.2012, § 701.7(A)) in Count 1.

[2] The jury found Appellant guilty of Kidnapping (21 O.S.Supp.2012, § 741) in Count 2. The District Court determined that this offense merged with Count 1 and dismissed the Count.

[3] Appellant is required to serve 85% of his sentence for Murder in the First Degree pursuant to 21 O.S.2011, § 13.1.

FACTS

On or about November 3, 2013, Duchone Whitworth visited the home of Christina McMinn. Appellant and his new girlfriend, Pauline "Tweedy" Kauffeld, had rented McMinn's extra room for a month and owed her money. Whitworth arrived in a maroon 2004 Buick Rainier. Although registered to the used car business that Whitworth jointly owned with his estranged wife, Whitworth regularly drove the vehicle.

Appellant had pimped Tweedy out to Whitworth. He left Whitworth with Tweedy in the rented room. Whitworth had sex with Tweedy but he refused to pay.

Appellant had several other grievances with Whitworth. He believed that a month or two prior, Whitworth had tried to rape or take advantage of Tweedy. He further believed that Whitworth owed him money for CD's and methamphetamine. Whitworth had driven Appellant, Tweedy and Bobby McBride to the Osage Casino and dropped them off. Appellant became upset when Whitworth did not return to pick them up.

When Appellant returned to discover that Whitworth had refused to pay he confronted Whitworth with a knife. Appellant ordered Tweedy to tie Whitworth's hands behind his back with a necktie and she complied. Whitworth pleaded for Appellant not to hurt him and promised to get the money. Appellant refused to release him. He advised Whitworth that it would be all right if he just paid up. They continued to argue over the promise for payment for approximately thirty minutes.

Lyndon Baker occasionally stayed overnight on McMinn's couch. He arrived at McMinn's house and discovered the trio arguing. McMinn was home but remained in her bedroom. Appellant and Tweedy marched Whitworth out of the bedroom, through the living room and out to Whitworth's SUV. Appellant directed Baker to go with them and he complied.

Appellant placed Whitworth in the passenger side backseat of the Rainier. Tweedy sat in the front seat on the passenger side. Baker sat in the driver's side backseat and held Whitworth at knifepoint. Appellant drove away from McMinn's house. He repeatedly asked where Whitworth lived and demanded that Whitworth take them to his house. Whitworth would not give Appellant his address. He stated that he could get the money and refused to give directions to his home. This stalemate lasted for a considerable period of time.

Eventually, Appellant drove the vehicle to an area near the Osage Casino in the 400 block of East 66th Street North. He cut the seat belt out of Whitworth's seat and marched everyone up a hill into a wooded area. Appellant ordered Whitworth onto his knees next to a tree. He tied Whitworth to the tree using the seatbelt and the drawstring from Whitworth's sweatshirt. Whitworth informed Appellant that he did not have to do this because he could get Appellant the money.

Baker asked Appellant what was going on and Appellant sent him back to the car. Baker tried to leave but Appellant had the car keys. After approximately fifteen minutes, Tweedy joined Baker in the car. When a police

officer stopped and inquired, Tweedy informed the officer that they were looking for a lost dog. The officer continued on his previous route.

During Tweedy's absence, Appellant stabbed Whitworth in the lower back and buttocks. He slashed Whitworth's throat with the knife.

When Tweedy went back up the hill, Whitworth was on the ground. Appellant stood over Whitworth holding a knife. The knife was bloody and Appellant had blood on his shirt. Whitworth's throat had been cut and there was blood on the front of his shirt. However, he was still alive. Appellant directed Whitworth to apologize for raping Tweedy. When he did not comply, Appellant struck him on the head with a stone and declared: "That's one l[ess] nigger there is." Tweedy returned to the SUV and waited with Baker.

Appellant returned bare-chested to the Rainier. He gave his balled up shirt to Tweedy and declared that Whitworth would not be returning with them. Appellant drove back to McMinn's house in the Rainier. Along the way he stopped and disposed of the bloody shirt in a trash dumpster. Appellant pawned one of the knives and Tweedy pawned the other.

As Whitworth refused to allow anyone to drive his vehicle, McMinn found it suspicious that the trio had returned without Whitworth. When she asked Appellant and Tweedy where Whitworth was at, Appellant informed both Baker and her that he had "stabbed the nigger twice and cut his fucking throat." Appellant threatened that he would kill Baker and McMinn if they told anybody.

Appellant and Tweedy left the following day in Whitworth's Rainier and did not return to McMinn's house. Several days thereafter, Bobby McBride encountered them in the SUV. When McBride asked Appellant where Whitworth was at, Appellant indicated "that nigger tried to rape my old lady but I promise you he won't rape anyone else." Appellant further advised McBride that he was either going to change the SUV into his name or have it crushed.

On November 18, 2013, Appellant caused Tweedy to marry him. He explained that if something went wrong she would not be able to testify against him. Fearing for her life, Tweedy married Appellant.

Appellant and Tweedy then visited the home of Scott Streeter. Appellant stated that Tweedy had just received a settlement and gotten the SUV. He explained that he had "killed a nigger for trying to rape Tweedy." He later informed Streeter that he had dumped the body out by the Osage Casino.

Whitworth shared several business ventures with his estranged wife, Adrienne Whitworth. She discovered that he was missing and traveled to one of the rental properties they jointly owned. Mrs. Whitworth and the renter repeatedly phoned Whitworth's cellphone. An older Caucasian male answered the phone and when they asked for Whitworth the individual angrily announced "I killed Duchone. He's dead." Mrs. Whitworth reported the matter to the Tulsa Police Department on December 2, 2013. She further reported the maroon Rainier as stolen.

While investigating an unrelated case, Detective Mark Kennedy interviewed McMinn. She advised the detective that Appellant had confessed to killing Whitworth. Kennedy interviewed Tweedy and Baker on December 12, 2013. Tweedy, then, led law enforcement officials to the wooded hill on East 66th North Street. There, officers discovered Whitworth's substantially decomposed body.

Forensic Anthropologist, Angela Berg, of the State Medical Examiner's Office led the efforts to recover Whitworth's body. The Medical Examiner's Office used Whitworth's military dental records to positively identify his body. Berg documented bone defects amongst Whitworth's remains and linear defects in the clothing recovered from the crime scene reflecting peri-mortem injuries. From these defects, pathologist Dr. Angela Goolsby, determined Whitworth's probable cause of death as multiple sharp-force injuries.

On December 22, 2013, Alvin Bender asked Appellant for a ride to pick up his paycheck. Appellant was still driving Whitworth's Rainier. He had Bender drive the SUV. When Detective Zenoni of the Tulsa Police Department initiated a stop on the vehicle, Appellant appeared anxious. He demanded that Bender flee and urged him "go, go." Instead, Bender pulled the vehicle over to the side of the road. Appellant became both outraged and scared.

DISCUSSION

In his sole proposition of error, Appellant contends that prosecutorial misconduct deprived him of a fair trial. He sets forth two separate instances where he argues that prosecutorial misconduct occurred.

This Court's review is well established. Prosecutorial comments, like jury instructions, are not reviewed in artificial isolation, but must be judged in the context of the entire record. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 116. "Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial." *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891 (quotations and citations omitted).

Citing several other state courts of appeal, the State requests that this Court change the term "prosecutorial misconduct" to "prosecutorial error." The State argues that "prosecutorial error" is the more appropriate term because "misconduct" should be limited to instances involving illegal conduct, fraud, misrepresentation or professional misconduct. However, we find that the State's argument is senseless and overlooks the very nature of a prosecutorial misconduct claim.

The United States Supreme Court has labeled this type of error as "misconduct" for more than 80 years. *See Berger v. United States*, 295 U.S. 78, 89, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) ("We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."). In so doing, the Supreme Court has long distinguished prosecutorial misconduct from simple prosecutorial error. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647–48, 94 S.Ct. 1868, 1873–74, 40 L.Ed. 2d 431

(1974). In *Donnelly*, the Supreme Court continued "the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct . . . [which] amount[s] to a denial of constitutional due process. *Id.*, *citing Miller v. Pate*, 386 U.S. 1, 7, 87 S.Ct. 785, 788, 17 L.Ed. 2d 690 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."). Illustrating this distinction, the Supreme Court found that this sort of "egregious conduct" did not occur in *Donnelly* where "[t]here were instead a few brief sentences in the prosecutor's long and expectably hortatory closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge." *Id.*, 416 U.S. at 647–48, 94 S.Ct. at 1873–74.

Although the ultimate determination whether relief is required focuses on the fairness of the trial instead of the prosecutor's culpability, the misconduct of the prosecutor is the error which drives this analysis. *See Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982) ("Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). In *Smith*, the Supreme Court held that "the Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial." *Id.*, 455 U.S. at 220, 102 S.Ct. at 948. While refusing to condone the prosecutor's conduct in the case, the Supreme Court determined that the prosecutor's misconduct did not deprive the criminal defendant of a fair trial. *Id.*, 455 U.S. at 220-21, 102 S.Ct. at 948. As the United States Supreme Court

has identified prosecutorial misconduct as the origin of this claim of error, we deny the State's request.

Turning to Appellant's allegations in the present case, we note that Appellant failed to challenge the prosecutor's comments at trial. Therefore, we find that he has waived appellate review of the issue for all but plain error. *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-12. We review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212; *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Appellant argues that the prosecutor's use of racially discriminatory language during closing argument constituted misconduct as the comments encouraged the jurors to allow improper sympathy, sentiment or prejudice to influence their decision. This Court has found that blatant appeals to sympathy, sentiment, or prejudice are improper. *Pryor v. State*, 2011 OK CR 18, ¶¶ 5-10, 254 P.3d 721, 722-25 (finding blatant appeal for sympathy, passion, and prejudice going beyond the scope of the evidence was improper); *Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604 (holding

prosecutor's argument bordered upon impropriety of overtly seeking sympathy for the victims); *Warner v. State*, 2006 OK CR 40, ¶ 190, 197, 144 P.3d 838, 890-91 (finding prosecutor's comments were based upon the evidence and not merely attempt to evoke sympathy for victims).

The record in the present case reveals that while quoting Appellant's numerous confessions the prosecutor uttered the word "nigger" five times.[4] This insulting and contemptuous term is almost certainly the most offensive and inflammatory racial slur in all of the English language. http://www.merriam-webster.com/dictionary/nigger. Its use is shocking and upsetting to the vast majority of listeners. *Id.* This type of speech is deplorable. When this word is discussed in polite company, people more often than not refer to it by the euphemism: "the n word." *Id.* However, this Court's opinions detail circumstances and events which are not the proper subject of polite company. *See Cole v. State*, 2007 OK CR 27, ¶ 29, 164 P.3d 1089, 1096 ("Gruesome crimes result in gruesome pictures."). Since racially discriminatory words are contemptuous, an individual's use of such language can hold excellent probative value of the speaker's motive, intent, or bias. *See Summers v. State*, 2010 OK CR 5, ¶ 31 n. 63, 231 P.3d 125, 135 n. 63 (discussing term's disrespectful nature); *Phillips v. State*, 1999 OK CR 38, ¶ 28, 989 P.2d 1017, 1029 (reviewing use of term as part of conduct evincing intent to kill victim); *Powell v. State*, 2000 OK CR 5, ¶ 72, 995 P.2d 510, 528 (reviewing use of term

[4] The witnesses at trial related that Appellant had referred to the victim in this manner. The prosecutor quoted the witnesses' testimony to the jury. While this Court abhors the use of this despicable term we also recognize the necessity of accurately recounting the testimony of a witness.

in determining existence of conspiracy); *Robinson v. State*, 1995 OK CR 25, ¶¶ 40-42, 900 P.2d 389, 401 (reviewing language in determining sufficiency of the evidence of aggravating circumstance). Therefore, this Court finds that a prosecutor's use of such language is only proper where the prosecutor is quoting a witness, recording or written statement and the language is probative of a fact at issue in the trial.

Appellant concedes that the prosecutor was quoting the witnesses who testified at trial in the present case. Five separate witnesses related that Appellant confessed to them.[5] Each of the witnesses testified that Appellant referred to the victim as "nigger" during his confession. The prosecutor recounted each of the statements and, later, argued that Appellant's words and conduct illustrated his intent to kill the victim. Although the jury ultimately acquitted Appellant of the alternative charge of First Degree Malice Aforethought Murder, Appellant's use of the contemptuous language was probative concerning his motive, intent, and the absence of mistake or accident. *See* 12 O.S.2011, § 2404(B). As the prosecutor's comments were properly based upon the evidence and were not a blatant appeal to sympathy, sentiment or prejudice, the comments were proper. Therefore, we find that Appellant has not shown that error, plain or otherwise, occurred.

[5] Four of the witnesses related that Appellant used the term while confessing to killing the victim. One of the witnesses related that Appellant used the term while confessing to harming the victim.

Appellant further argues that the prosecutor unfairly commented upon his failure to testify. Reviewing this claim for plain error under the test set forth in *Simpson*, we find that Appellant has not shown that plain error occurred.

In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the United States Supreme Court recognized that the Fifth Amendment prohibits comment by the prosecution on the accused's refusal to testify. *Id.*, 380 U.S. at 615, 85 S.Ct. at 1233. However, it is not enough that the prosecutor make a direct reference to the defendant's failure to testify. *United States v. Robinson*, 485 U.S. 25, 31-32, 108 S.Ct. 864, 868-69, 99 L.Ed.2d 23 (1988). Instead, "'*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.'" *Id.*, *quoting Baxter v. Palmigiano*, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976).

In *Robinson*, the prosecutor referenced the defendant's failure to testify when defense counsel argued that the government had not allowed the accused to explain his side of the story. *Id.*, 485 U.S. at 26, 32, 108 S.Ct. at 866, 869. The Supreme Court determined that the prosecutor's reference to the defendant's opportunity to testimony did not infringe upon his Fifth Amendment rights because the prosecutor did not ask the jury to draw an adverse inference from the defendant's silence. *Id.*, 485 U.S. at 32, 108 S.Ct. at 869.

The record in the present case reveals that the prosecutor did not infringe upon Appellant's Fifth Amendment rights. Appellant chose not to

testify at trial. Utilizing Instruction Number 9-44, OUJI-Cr(2d)(Supp.2000), the District Court instructed the jury that it could not use this fact as an inference of guilt, permit that fact to weigh in the slightest degree against him, or allow this fact to enter into their discussions or deliberations in any manner. The prosecutor did not make any comment about Appellant's refusal to testify in his closing argument. During Appellant's closing argument, defense counsel informed the jury why he had not put Appellant on the witness stand. When defense counsel added that Appellant "told you and everyone in this court that he is not guilty" the prosecutor objected and stated that "his plea of not guilty is not evidence." As the prosecutor did not suggest or infer that the jury draw an adverse inference from Appellant's decision not to testify, we find that the comment did not infringe upon Appellant's Fifth Amendment rights.

We further note that the District Court's actions cured any error. *Hanson v. State*, 2009 OK CR 13, ¶ 19, 206 P.3d 1020, 1028 ("Error is cured where a defendant's objection to improper argument is sustained."); *Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599 (prosecutorial misconduct cured when trial court sustains objection). A jury admonishment to disregard a prejudicial remark cures any error. *DeRosa v. State*, 2004 OK CR 19, ¶ 50, 89 P.3d 1124, 1144.

In the present case, the District Court denied the prosecutor's objection and admonished the attorneys to avoid speaking objections. The admonishment cured the speaking objection. The District Court's denial of the prosecutor's objection permitted the jury to consider Appellant's plea of not

guilty. In light of the District Court's instruction that the jury was not to allow Appellant's decision not to testify to enter into their discussions or deliberations in any manner, we find that any error was cured. Therefore, we find that Appellant has not shown that error, plain or otherwise, occurred.

Reviewing the entire record in the present case, the cumulative effect of the prosecutor's comments did not deprive Appellant of a fair trial. *Malone*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212. The evidence of Appellant's guilt was particularly strong. His sentences were driven by his numerous former felony convictions. Thus, we find that prosecutorial misconduct did not deprive Appellant of a fundamentally fair trial and we deny this proposition of error.

DECISION

The judgments and sentences are hereby **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur in Result
JOHNSON, J.: Concur in Result
SMITH, J.: Concur in Result
HUDSON, J.: Concur in Result

LEWIS, JUDGE, CONCURRING IN RESULT:

I concur in the decision reached by the court in this matter. However I write separately to point out that the author of this opinion did not have to repeat the repugnant language used by the Appellant. The repeated use of the "n" word in this opinion was unnecessary to the reader's understanding of the language used by the Appellant, and unnecessary to the court's resolution of this case.

HUDSON, JUDGE: CONCUR IN RESULTS

There is an old saying used by lawyers that comes to mind when I read the facts of this case. When you cast a play in hell, you don't necessarily get angels in the lead roles. A sampling of the facts establishing the players in this case confirms the wisdom of this adage. The record shows Appellant "pimped out" Tweedy, his new girlfriend, in a rented room to Whitworth who, in turn, refused to pay for the sex. Appellant had several previous grievances with Whitworth, including Appellant's belief that Whitworth had, in the past, tried to rape or take advantage of Tweedy. Whitworth too owed Appellant money for drugs.

This is hardly the stuff of G-rated films or even "family hour" network television programming (if such a thing still exists). But we are not Hollywood studio executives producing entertainment for general consumption by the American public. Nor are we the so-called "word police" who flag for erasure words and phrases from our opinions reflecting facts from the record which are, or may be, offensive to the general public. Rather, we are Judges reviewing cases on appeal who have sworn an oath of fidelity to the law and facts as presented to us in the record on appeal. I find nothing unusual, let alone gratuitous, about the authoring judge's exposition of the facts in this case, including the numerous racist remarks made by Appellant towards the victim. Indeed, the testimony concerning the exact wording of Appellant's various confessions to the killing demonstrates a consistency in his use of racist language which, at the least, bolsters the reliability of the State's case—a

case supported in large part by testimony from Appellant's own associates. This factual exposition was also relevant to discussion of the prosecutorial misconduct claim raised by Appellant in this case.

Our cases reflect reality and that reality is oftentimes not pretty. Nonetheless, as Judges, we have an obligation to explain our decisions on appeal in a way the reader can understand why we ruled the way we did. Sometimes that will involve the use of outrageous language that would have no place in polite, enlightened conversation. This is one such case. We all understand the offensive, inflammatory nature of this language. If anything, the authoring judge unnecessarily goes to great lengths in the prosecutorial misconduct discussion to address Appellant's racist language. But I can hardly criticize the authoring judge for doing little more than explaining, based on the record evidence, the evidence used to sentence Appellant to prison for life without the possibility of parole. Moreover, I can hardly fault the prosecutor at trial for using this same tactic in his closing argument.

I concur in the decision reached by the Court in this matter. I write separately to express my view that, if we are willing to erase highly relevant—albeit offensive—facts from our opinions, we will send a terrible message to the bench, bar and public that the truth, when objectionable, should be redacted merely to avoid controversy. I cannot join in this view.